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5

6 Attorney for Matthew D. Sawyer  
7

8 U.S. District Court, Northern District of California  
9

10 Rodney Martin et al.

NO. CV 07-05747 EMC

11  
12 Plaintiffs

**NOTICE OF MOTION TO  
DISMISS**

13  
14 vs.

**[FRCP 12(b)(1), (2), (3) & (6)]**

15  
16  
17 Wilda Burroughs et al.,

Hearing: Jan. 23, 2008

18  
19 Defendants

10:30 AM

Courtroom C

Magistrate Chen

20  
21  
22  
23 Notice is hereby that on January 23, 2008, at 10:30 AM, Courtroom C,  
24  
25 15<sup>th</sup> Floor, 400 Golden Gate Avenue, San Francisco, CA, defendant Matthew D  
26  
27 Sawyer will move for dismissal of this action, or in the alternative, for abstention  
28  
29 under the doctrine of forum nonconveniens.

30  
31 Said motion will be made on the following grounds:

32  
33 (1) This court lacks subject matter jurisdiction over this dispute,  
34  
35 which is within the sole jurisdiction of the Federal Election Commission ("FEC")  
36  
37 FRCP 12 (b) (1).

38  
39 (2) This court lacks personal jurisdiction over defendant, who is a  
40  
41 resident of Texas and who lacks minimum contacts with CA. Assuming  
42  
43 *arguendo*, that minimum contacts did exist California. Would not be a convenient  
44  
45 forum. FRCP 12 (b) (2)

46  
47 (3) This court lacks venue over this dispute since no defendant resides

Notice of Motion To Dismiss

1 in CA, and the claim did not arise in CA. FRCP 12 (b) (3)

2  
3 (4) Defendant has failed to state a claim upon which relief can be  
4  
5 based, including but not limited to the following issues:

6  
7 (a) The FEC has exclusive jurisdiction over this dispute.

8  
9 (b) The requisite allegations of distinctive, directness and predicate  
10  
11 acts necessary to support a RICO claim are lacking

12  
13 (c) Defendant has alleged a conspiracy between three attorneys and  
14  
15 their clients but has not complied with the pre-filing judicial approval requirements  
16  
17 of California Civil Code 1714.10

18  
19 (d) The action is barred by California Code of Civil Procedure Section  
20  
21 425.16, since it is brought against defendants for engaging in constitutionally-  
22  
23 protected activities, including litigation, and plaintiff cannot factually show a  
24  
25 reasonable probability of prevailing on such claims.

26  
27 FRCP 12 (b) (6)

28  
29  
30 DATED: 12/19/07

31  
32 

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ARLO H. SMITH , Attorney for Matthew D.  
33 Sawyer  
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45  
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47

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8 U.S. District Court, Northern District of California  
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NO. CV 07-05747 EMC

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12 Plaintiffs

**MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS**

13  
14 vs.

15  
16 **[FRCP 12(b)(1), (2), (3) & (6)]**

17 Wilda Burroughs et al.,

Hearing: Jan. 23, 2008

18  
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10:30 AM

Courtroom C

Magistrate Chen

20  
21  
22  
23 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**  
24

25  
26 **FACTS**  
27

28 This prolix and confusing complaint was filed *in pro se*.  
29

30 To the extent that the complaints contains any specifics, it alleges  
31

32 (1) failure to file or improper filings by defendants with the Federal Elections  
33

34 Commission ("FEC") [**Complaint. Para. 26**] and (2) allegedly vexatious litigation,  
35

36 of which the only examples plaintiff gives are actions in TEXAS and FLORIDA  
37

38 [**Complaint. Para. 25, 29, 31, 32, 33, 34, 35, 36, 37, 38, 41**]  
39

40 The Complaint alleges NO ACTIVITIES by ANY DEFENDANT in California.  
41

42 Moreover, NO DEFENDANT resides in CA. On the contrary, the complaint  
43

44 admits that the residences of defendants are as follows:  
45

46 **TEXAS** – Matthew D. Sawyer, Charles Foster, Rebecca Foster, Beverly Kennedy  
47 [**Complaint. Para. 5, 13, 14, 15**]

1  
2 **NEW YORK** - D. Andrew Byrne [**Complaint. Para. 3**]

3  
4 **FLORIDA** – Jackson W. Mayanrd, Jr., Ruben J. Hernandez, Jr. [**Complaint.**  
5 **Para. 4, 15**]

6  
7 **NEBRASKA** – Janelle Skinner-Weill, Winan Wichapi To, Inc. [**Complaint.**  
8 **Para. 6, 7**]

9  
10 **MISSISSIPPI** – Theodore C. Weill, Terry P. Weill, Universal Wearparts, Inc.  
11 [**Complaint. Para. 8, 9, 10**]

12  
13 **RHODE ISLAND** - David C. Richardson, R.I. Refrigeration Supply Co., Inc.  
14 [**Complaint. Para. 11, 12**]

15  
16 The Complaint also specifically alleges that D. Andrew Byrne, Jackson W.  
17  
18 Maynard, Jr. and Matthew D. Sawyer are attorneys and are being sued for their  
19  
20 activities as attorneys representing clients. [**Complaint. Para. 25**]  
21

22  
23 **LEGAL ARGUMENT**

24  
25 **I. THE FEC HAS EXCLUSIVE JURISDICTION OVER THIS**  
26 **DISPUTE**

27  
28 Though inartfully pleaded, the Complaint is explicit in claiming defendants  
29  
30 are allegedly guilty of violations of federal elections laws. [**Complaint. Para. 26**]  
31

32 The law is clear that the FEC has EXCLUSIVE jurisdiction over federal  
33  
34 campaign finances. 21 USC Sec. 437(e) provides:  
35

36 Except as provided in section 437g(a)(8) of this title, the power of the  
37 Commission to initiate civil actions under Subsection (a)(6) of this section shall  
38 be the **exclusive civil remedy** for enforcement of this provisions of this Act.  
39

40 Emphasis added. 21 USC Sec. 437g (a)(8) allows plaintiff to file a civil action  
41  
42 in the **United States Court for the District of Columbia** only if plaintiffs FIRST  
43  
44 have exhausted remedies before the FEC.

45  
46 Since this case was not brought in the United States Court for the District of

1  
2 Columbia, and plaintiff has not alleged exhaustion of remedies before the FEC, the action  
3  
4 must be dismissed for lack of subject matter jurisdiction.

5  
6 **II. THE COURT LACKS PERSONAL JURISDICTION OVER**  
7 **DEFENDANTS, AND CALIFORNIA WOULD BE AN**  
8 **INCONVENIENT FORM IN ANY EVENT**  
9

10 The Complaint alleges NO ACTIVITIES by ANY DEFENDANT in California.

11  
12 Moreover, NO DEFENDANT resides in CA. On the contrary, the complaint  
13  
14 admits that the residences of defendants are as follows:

15  
16 **TEXAS** – Matthew D. Sawyer, Charles Foster, Rebecca Foster, Beverly Kennedy  
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19 **NEW YORK** - D. Andrew Byrne **[Complaint. Para. 3]**  
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28 **[Complaint. Para. 8, 9, 10]**

29  
30 **RHODE ISLAND** - David C. Richardson, R.I. Refrigeration Supply Co., Inc.  
31 **[Complaint. Para. 11, 12]**

32  
33 Based on plaintiff's OWN PLEADING, minimum jurisdictional contacts  
34  
35 with California are lacking.

36  
37 Moreover, even assuming such contacts barely existed, California is obviously  
38  
39 an inconvenient forum. Inconvenience is established by defendants OWN  
40  
41 COMPLAINT. Said Complaint seeks to attach liability based (1) failure to file or  
42  
43 improper filings by defendants with the Federal Elections Commission ("FEC") - which  
44  
45 is in Washington, DC **[Complaint. Para. 26]** and (2) allegedly vexatious litigation, of  
46

1 which the only examples plaintiff gives are actions in TEXAS and FLORIDA

2  
3 **[Complaint. Para. 25, 29, 31, 32, 33, 34, 35, 36, 37, 38, 41]**

4  
5 Obviously, the convenient forum to try this case would be TX or FL, not CA!

6  
7  
8 **III. THE COURT LACKS VENUE OVER THIS ACTION**

9  
10 The Complaint alleges NO ACTIVITIES by ANY DEFENDANT in California.

11  
12 Moreover, NO DEFENDANT resides in CA. On the contrary, the complaint  
13 admits that the residences of defendants are as follows:

14  
15  
16 **TEXAS** – Matthew D. Sawyer, Charles Foster, Rebecca Foster, Beverly Kennedy  
17 **[Complaint. Para. 5, 13, 14, 15]**

18  
19 **NEW YORK** - D. Andrew Byrne **[Complaint. Para. 3]**

20  
21 **FLORIDA** – Jackson W. Mayanrd, Jr., Ruben J. Hernandez, Jr. **[Complaint.**  
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23  
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27 **MISSISSIPPI** – Theodore C. Weill, Terry P. Weill, Universal Wearparts, Inc.  
28 **[Complaint. Para. 8, 9, 10]**

29  
30 **RHODE ISLAND** - David C. Richardson, R.I. Refrigeration Supply Co., Inc.  
31 **[Complaint. Para. 11, 12]**

32  
33 Based on plaintiff's OWN PLEADING, it is clear that venue will not lie in CA,  
34 since venue exists only where "all defendants reside" or where "the claim arose."  
35  
36  
37 28 USC Section 1391 (b).

38  
39  
40 **IV. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR RELIEF**

41  
42 **A. REQUISITE ALLEGATIONS OF DISTINCTIVE, DIRECTNESS**  
43 **AND PREDICATE ACTS NECESSARY TO SUPPORT A RICO**  
44 **CLAIM ARE LACKING**

1 To state a claim under RICO, plaintiff must plead and prove defendants  
2  
3 influenced an “enterprise” SEPARATE FROM the persons alleged to have violated  
4  
5 RICO. *New Beckley vs. International Union* (4<sup>th</sup> Cir. 1994) 18 F.3d 1161.  
6

7 Plaintiff has alleged no such separate “enterprise” but merely claims THESE  
8  
9 defendants comprise the enterprise!  
10

11  
12 Secondly, the high court has held that plaintiff must show it was DIRECTLY  
13  
14 injured by defendant’s RICO violations. For example, a businessperson cannot sue a  
15  
16 competitor under RICO for failing to collect or pay taxes, even if non-payment of  
17  
18 taxes gives the competitor an advantage, because the STATE is the DIRECTLY injured  
19  
20 party. *Anza vs. Ideal Steel Supply Corp.* (2006) 126 S.Ct. 1991.  
21

22 Here, even if defendants REALLY DID file false campaign reports, or bring  
23  
24 vexatious suits, defendant never says how PLAINTIFF was injured.  
25

26 Finally, since plaintiff has repeatedly claimed “fraud” he must comply with the  
27  
28 specificity requirements of FRCP 9(b), which requires: “In all averments of fraud or  
29  
30 mistake, the circumstances constituting such fraud or mistake must be stated with  
31  
32 particularity.” Because plaintiff has failed to do so, he has failed to adequately allege  
33  
34 predicate acts to support a RICO claim.  
35

36 **B. DEFENDANT HAS ALLEGED A CONSPIRACY BETWEEN**  
37 **THREE ATTORNEYS AND THEIR CLIENTS BUT HAS NOT**  
38 **COMPLIED WITH THE PRE-FILING JUDICIAL APPROVAL**  
39 **REQUIREMENTS OF CALIFORNIA**  
40

41 The Complaint also specifically alleges that D. Andrew Byrne, Jackson W.  
42  
43 Maynard, Jr. and Matthew D. Sawyer are attorneys and are being sued for their  
44  
45 activities as attorneys representing clients. [Complaint. Para. 25]  
46

1 California Civil Code 1714.10 generally requires **PRE-FILING JUDICIAL**  
 2  
 3 **APPROVAL** for any allegation of conspiracy between an attorney and  
 4  
 5 his/her clients:  
 6

7 (a) No cause of action against an attorney for a civil  
 8 conspiracy with his or her client arising from any attempt to contest  
 9 or compromise a claim or dispute, and which is based upon the  
 10 attorney's representation of the client, shall be included in a  
 11 complaint or other pleading unless the court enters an order allowing  
 12 the pleading that includes the claim for civil conspiracy to be  
 13 filed after the court determines that the party seeking to file the  
 14 pleading has established that there is a reasonable probability that  
 15 the party will prevail in the action. The court may allow the filing  
 16 of a pleading claiming liability based upon such a civil conspiracy  
 17 following the filing of a verified petition therefor accompanied by  
 18 the proposed pleading and supporting affidavits stating the facts  
 19 upon which the liability is based. The court shall order service of  
 20 the petition upon the party against whom the action is proposed to be  
 21 filed and permit that party to submit opposing affidavits prior to  
 22 making its determination. The filing of the petition, proposed  
 23 pleading, and accompanying affidavits shall toll the running of any  
 24 applicable statute of limitations until the final determination of  
 25 the matter, which ruling, if favorable to the petitioning party,  
 26 shall permit the proposed pleading to be filed.  
 27

28 (b) Failure to obtain a court order where required by subdivision  
 29 (a) shall be a defense to any action for civil conspiracy filed in  
 30 violation thereof. The defense shall be raised by the attorney  
 31 charged with civil conspiracy upon that attorney's first appearance  
 32 by demurrer, motion to strike, or such other motion or application as  
 33 may be appropriate. . . .  
 34

35 "The Legislature enacted section 1714.10 to eliminate frivolous allegations  
 36  
 37 of conspiracy between attorneys and clients." *Castro v. Higaki* (1994) 31 Cal.  
 38  
 39 App. 4th 350, 356.  
 40

41 ". . . Civil Code section 1714.10 unambiguously applies to all alleged  
 42 conspiracies between an attorney and his client. . . . The statute  
 43 expressly states: '*No cause of action against an attorney based upon a*  
 44 *civil conspiracy with his or her client ....*' ( Civ. Code, § 1714.10; italics  
 45 added.) We note further that the existence of other coconspirators, who  
 46 are neither attorneys nor clients, does not preclude the applicability of the



1 section. It is frequently the case that alleged attorney-client conspiracies  
2 involve third parties. . . . “

3  
4 *Pierce v. Lyman* (1991) 1 Cal. App. 4th 1093, 1109-1110

5  
6 Because a pleading filed in violation of Civil Code section 1714.10 is

7  
8 **NOT ALLOWED**, any party named in such a pleading is entitled to demur  
9  
10 to such a cause of action:

11  
12 “Insofar as section 1714.10 is concerned, respondents' civil conspiracy  
13 count must survive or fall as a single unit. In this case it fails because it  
14 includes PMS, which is entitled to the protections of the prefiling  
15 procedures. The conspiracy cause of action was therefore an  
16 unauthorized filing, no better than a courtroom trespasser, and subject to  
17 a motion to strike. Sustaining the special section 1714.10 demurrer in  
18 these circumstances has the same effect as granting a motion to strike an  
19 unauthorized pleading: the subject of the demurrer is no longer a pleading  
20 and may not be treated as one. (E.g., Code Civ. Proc., § 436, subd. (b)  
21 [court may strike "all or any part of any pleading not . . . filed in conformity  
22 with the laws of this state"]; 5 Witkin, Cal. Procedure, *supra*, Pleading, §  
23 940, p. 398 ["the demurrer destroys the complaint as a pleading"]; 49  
24 Cal.Jur.3d, Pleading, § 220, p. 668.) Appellants' demurrer should have  
25 been sustained.”

26  
27 *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal. App. 4th 599, 607.

28  
29 As the foregoing authorities indicate, Civil Code Section 1714.10 is part of  
30  
31 the substantive law of CA, which must be applied by federal courts sitting in CA,  
32  
33 absent a contrary federal law or rule.

34  
35 Because plaintiff has filed a pleading in a California district court which  
36  
37 alleges a conspiracy between three attorneys and their clients, this case must  
38  
39 be dismissed for plaintiff's noncompliance with with Civil Code Section 1714.10.

40  
41 **C . THE ACTION IS BARRED BY CALIFORNIA CODE OF CIVIL**  
42 **PROCEDURE SECTION 425.16, SINCE IT IS BROUGHT**  
43 **AGAINST DEFENDANTS FOR ENGAGING IN**  
44 **CONSTITUTIONALLY-PROTECTED ACTIVITIES, INCLUDING**  
45 **LITIGATION, AND PLAINTIFF CANNOT FACTUALLY SHOW A**

**REASONABLE PROBABILITY OF PREVAILING ON SUCH  
CLAIMS**

The complaint herein alleges vexatious litigation by defendants  
of which the only examples plaintiff gives are actions in TEXAS and FLORIDA

**[Complaint. Para. 25, 29, 31, 32, 33, 34, 35, 36, 37, 38, 41]**

California Code of Civil Procedure Section 425.16 provides

(a) The Legislature finds and declares that there has been  
a disturbing increase in lawsuits brought primarily to chill the  
valid exercise of the constitutional rights of freedom of speech and  
petition for the redress of grievances. The Legislature finds and  
declares that it is in the public interest to encourage continued  
participation in matters of public significance, and that this  
participation should not be chilled through abuse of the judicial  
process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of  
that person in furtherance of the person's right of petition or free  
speech under the United States or California Constitution in  
connection with a public issue shall be subject to a special motion  
to strike, unless the court determines that the plaintiff has  
established that there is a probability that the plaintiff will  
prevail on the claim.

(2) In making its determination, the court shall consider the  
pleadings, and supporting and opposing affidavits stating the facts  
upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a  
probability that he or she will prevail on the claim, neither that  
determination nor the fact of that determination shall be admissible  
in evidence at any later stage of the case, or in any subsequent  
action, and no burden of proof or degree of proof otherwise  
applicable shall be affected by that determination in any later stage  
of the case or in any subsequent proceeding.

(c) In any action subject to subdivision (b), a prevailing  
defendant on a special motion to strike shall be entitled to recover  
his or her attorney's fees and costs. . . .

(e) As used in this section, "act in furtherance of a person's  
right of petition or free speech under the United States or  
California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a  
legislative, executive, or judicial proceeding, or any other official

1 proceeding authorized by law; (2) any written or oral statement or  
 2 writing made in connection with an issue under consideration or  
 3 review by a legislative, executive, or judicial body, or any other  
 4 official proceeding authorized by law; (3) any written or oral  
 5 statement or writing made in a place open to the public or a public  
 6 forum in connection with an issue of public interest; (4) or any  
 7 other conduct in furtherance of the exercise of the constitutional  
 8 right of petition or the constitutional right of free speech in  
 9 connection with a public issue or an issue of public interest. . . .

10  
 11  
 12 “Section 425.16, subdivision (b)(1) defines the types of claims that are  
 13 subject to the anti-SLAPP procedures. These claims include causes of  
 14 action “*arising from*” an “*act of that person in furtherance of the person's*  
 15 *right of petition . . . under the United States or California Constitution in*  
 16 *connection with a public issue.*” (§ 425.16, subd. (b)(1), italics added.)

17  
 18 “It is well established that filing a lawsuit is an exercise of a party's  
 19 constitutional right of petition. . . .’ [T]he constitutional right to petition . . .  
 20 includes the basic act of filing litigation or otherwise seeking administrative  
 21 action.’ . . . Further, the filing of a judicial complaint satisfies the ‘in  
 22 connection with a public issue’ component of section 425.16, subdivision  
 23 (b)(1) because it pertains to an official proceeding. . . .”

24  
 25 *Chavez v. Mendoza* (2001) 94 Cal. App. 4th 1083, 1087, some internal quotation  
 26  
 27 marks omitted.

28  
 29 Since defendants are being sued in a federal court sitting in CA for  
 30  
 31 litigation activities, this case is subject to the provisions of California CCP Section  
 32  
 33 425.16.

34  
 35 “Section 425.16 posits instead a two-step process for determining whether  
 36 an action is a SLAPP. First, the court decides whether the defendant has  
 37 made a threshold showing that the challenged cause of action is one  
 38 arising from protected activity. (§ 425.16, subd. (b)(1).) ‘A defendant  
 39 meets this burden by demonstrating that the act underlying the plaintiff's  
 40 cause fits one of the categories spelled out in section 425.16, subdivision  
 41 (e)’ . . . . If the court finds that such a showing has been made, it must  
 42 then determine whether the plaintiff has demonstrated a probability of  
 43 prevailing on the claim. (§ 425.16, subd. (b)(1) . . . )”

44  
 45 *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88.

1  
2 Since the Complaint arises out of constitutionally protected litigation  
3  
4 activities “the burden shifts to the plaintiff to show a probability of prevailing in the  
5  
6 litigation.” *Shekhter v. Fin. Indem. Co.*, *supra*, 89 Cal. App. 4th at p. 151.  
7

8 To meet this burden, plaintiff “must demonstrate that  
9  
10 the complaint is both legally sufficient and supported by a sufficient  
11  
12 prima facie showing of facts to sustain a favorable judgment if the  
13  
14 evidence submitted by the plaintiff is credited.” *Navellier, supra*, 29  
15  
16 Cal. 4th at pp. 88-89, citations and internal quotation marks omitted.  
17

18 Here, the plaintiff has not even alleged – much less proven – a prima  
19  
20 facie case.  
21

## 22 CONCLUSION

23  
24 For all of the foregoing reasons, this action must be dismissed  
25

26  
27  
28 DATED: 12/19/07  
29

30 \_\_\_\_\_  
31 ARLO H. SMITH , Attorney for Matthew D.  
32 Sawyer  
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